(2)

No. 98-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RUHRGAS AG,

Petitioner,

v.

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

CLIFTON T. HUTCHINSON *
J. GREGORY TAYLOR
DAVID J. SCHENCK
DEREK S. HOLLINGSWORTH
HUGHES & LUCE, L.L.P.
1717 Main Street
Suite 2800
Dallas, Texas 75201
(214) 939-5500
Attorneys for Respondents
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

37pp

QUESTION PRESENTED

In a case properly filed in state court and removed by the Defendant to federal court, may a district court ignore a challenge to federal subject matter jurisdiction, conduct discovery, and enter an order of dismissal without ever determining the basis, if any, of federal subject matter jurisdiction?

RULE 29.6 DISCLOSURE

Marathon Oil Company, Inc. ("Marathon") is a subsidiary of USX Corp. Marathon International Oil Company ("MIOC") is wholly-owned by Marathon. Marathon Petroleum Norge A/S is a Norwegian Corporation whose stock is held by a wholly-owned affiliate of MIOC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISION

STATUTES AND RULES

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-470

RUHRGAS AG,

Petitioner,

v.

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

There is no jurisdiction. Every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *see also Juidice v. Vail*, 430 U.S. 327, 331-32 (1977) (standing). "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the

error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440 (1936) (footnotes omitted).

Congress directed that a case "shall" be remanded immediately whenever it appears that the district court lacks removal jurisdiction. 28 U.S.C. § 1447(c). It also directed that an order of remand "is not reviewable on appeal or otherwise" because such delay would unduly interfere with the operations of the state courts. *Id.* § 1447(d). Despite the comity concerns and despite the conclusion of the Fifth Circuit panel that there was never federal jurisdiction in this case, the basis for federal jurisdiction is still unknown. The Fifth Circuit *en banc* did not address the issue, and the district court has been unwilling or unable, despite the Fifth Circuit's mandate and direct requests for a ruling, to rule regarding the existence of federal jurisdiction. Even if this Court does not find any issue in this case worthy of certiorari, it can and should consider the question whether this case is properly before this or any other federal court.

STATEMENT OF THE CASE

A. Background

On July 6, 1995, Respondents Marathon Oil Company ("Marathon"), Marathon International Oil Company ("MIOC"), and Marathon Petroleum Norge ("Norge") filed this case in Texas state court, alleging conspiracy, fraud, and participation in a breach of fiduciary duty. Marathon and MIOC alleged that Petitioner defrauded them into loaning hundreds of millions of dollars for the development of the Heimdal gas field based on misrepresentations and fraudulent omissions contained in hundreds of letters sent by Petitioner to them in Houston, Texas over a multi-year period. Petitioner also traveled to Marathon's Houston, Texas headquarters for three in-person meetings concerning the matter.

Norge is a Norwegian corporation and an affiliate of Marathon and MIOC. It owns the production license for the Heimdal field. Norge alleges that the value of its license has been diminished by Petitioner's refusal to permit Heimdal gas to be sold to *any* buyers who are not members of Petitioner's cartel known as the "Consortium." It also alleged that Petitioner participated in breaches of fiduciary duties owed to Norge by its joint venture partner, Statoil (the Norwegian oil and gas company). These matters, too, were the subject of the three in-person Houston meetings and correspondence directed to Respondents in Texas.

Respondents' claims arise from, or directly relate to, deliberate contacts by Petitioner with the forum. Furthermore, Petitioner has maintained its own employees living and working in Houston for many years. None of Respondents' claims present a federal question; instead, they are garden-variety tort claims arising under Texas law.

B. The Removal

Petitioner removed the case on August 21, 1995.[1] Despite the absence of any apparent basis for federal subject matter jurisdiction, Petitioner alleged both federal question and diversity jurisdiction. First, it urged that an arbitration agreement made the case removable; a position contradicted by sworn statements in its own removal papers that "Ruhrgas has never entered into any agreement with any of the Plaintiffs concerning gas produced from the Heimdal field or any of the matters that are the subject of . . . this action." Ex. B to Notice of Removal. The District Court rejected the argument that the case could be stayed pending arbitration in the absence of any consent to arbitrate.

---

[1] Petitioner to date has not filed an answer, offered any sworn denial, or answered discovery relating to the essential alegations of this lawsuit.

Petitioner next argued that the case presented issues of such international significance that no state court should be permitted to hear it. According to Petitioner, the federal common law of "international relations" provided a basis for removal independent of any congressional statute. The District Court never addressed this contention; the Fifth Circuit panel rejected it. App. A.

Finally, Petitioner asserted that diversity jurisdiction existed. Because Norge and Petitioner both are aliens, however, there is no diversity. Although Petitioner nakedly asserted that Norge was "fraudulently joined," the only evidence on the point established that (1) Norge actually owns the relevant production license, (2) Norwegian law requires that a Norwegian company like Norge hold the license, and (3) Norge contends the value of its license has been diminished by Petitioner's refusal to permit Heimdal gas to be sold to *anyone* other than the "Consortium." Norge also alleges that Petitioner participated in breaches of fiduciary duties owed to Norge by its partner, Statoil (the Norwegian oil and gas company). Thus, Norge obviously has a sufficient interest in the case to avoid any serious assertion that its joinder here was somehow "fraudulent." Accordingly, all three novel arguments for removal jurisdiction are, and since the time of removal in August 1995 have been, lacking in any colorable merit.

C. The Motion to Remand for Lack of Federal Jurisdiction

On September 15, 1995, Respondents moved to remand, pointing out the absence of federal subject matter jurisdiction apparent from the face of the petition. On that same date, Respondents also moved to stay the case pending a determination of the existence of federal subject matter jurisdiction. That motion urged that subject matter jurisdiction be resolved as a threshold matter and, in view of the assertion of both federal question and diversity jurisdiction, the basis, if any, of subject matter

jurisdiction had to be resolved before it could be determined whether personal jurisdiction would relate to Petitioner's contacts with Texas or the United States. FED. R. CIV. P. 4(k)(2). The District Court denied that request.

Instead, the District Court granted Petitioner's request to have "discovery" to identify grounds for its removal and to support its various motions, including its personal jurisdiction challenge. On March 29, 1996, the court dismissed for lack of personal jurisdiction, reasoning that there was no proof that a tort had been committed by Petitioner's representatives while they were physically present in Marathon's Houston offices. The court never addressed whether there was any basis for federal subject matter jurisdiction.

D. The Appeal and First Petition for Certiorari

At oral argument, the Fifth Circuit panel expressed no particular enthusiasm for the personal jurisdiction holding, and pressed counsel for both parties to explain (1) why this case was in the federal courts and (2) why it was necessary to reach personal jurisdiction at all. It ruled, on June 10, 1997, that it lacked subject matter jurisdiction and that the case should be remanded to state court. Petitioner then filed a petition for writ of certiorari asserting that the case should be arbitrated. This Court denied the Petition on November 10, 1997. App. B. Following this Court's denial of certiorari, the Fifth Circuit *sua sponte* set the case for *en banc* reconsideration.

On June 22, 1998, the *en banc* court handed down the decision at issue in this second Petition. It rejected the former rule, finding it inconsistent with congressional policy reflected throughout the removal statutes and decisions of this Court concerning both removal and the power of the inferior courts under Article III. The *en banc* court remanded to the District Court for a ruling on the

Motion to Remand. On July 17, 1998, the Fifth Circuit rejected Petitioner's Motion to Stay the Mandate pending this Petition. As of the date of this filing, despite renewed requests, the District Court has not ruled whether subject matter jurisdiction exists.

SUMMARY OF OPPOSITION

This effort at interlocutory review does not present any novel issue, nor are the principles involved the subject of any actual circuit conflict. The Petition questions whether a federal court can ignore a challenge to its subject matter jurisdiction and rule instead on a motion to dismiss for lack of personal jurisdiction. Petitioner asserts that so long as the personal jurisdiction question is "easier," then a federal court may ignore a "difficult" question of subject matter jurisdiction in the interests of judicial economy. Respondents submit that, at least in removed cases, subject matter jurisdiction is a fundamental threshold issue that must be decided before a federal court can rule on any other matter.

This Court has already resolved, on occasions too numerous to count, that federal subject matter jurisdiction must be determined as a threshold matter. This is especially true of removed cases. Any rule to the contrary would run counter to the limited jurisdiction afforded the lower courts in Article III of the Constitution and by Congress in the removal statutes. It also would create the potential, realized in this case, for prolonged delay in remanding cases improvidently removed from state court dockets.

The Fifth Circuit was correct in rejecting a rule that would permit a district court to ignore the question whether federal subject matter jurisdiction exists while it retains a case for discovery and, perhaps, dismissal for lack of amenability to service of process. The dismissal entered in this case was erroneous and was subject to

correction on appeal. Nonetheless, a rule that would endorse this procedure would leave the threshold question of state or federal jurisdiction unanswered for years.

The Fifth Circuit's opinion followed decisions of this and other courts. Accordingly, the Petition should be denied. In connection with its evaluation of this Petition, however, this Court can and should examine the basis for this case's presence in the federal system. As no such basis exists, the Court should note the absence of subject matter jurisdiction even if it determines that there is no question worthy of review of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner advocates a system in which federal courts can assume subject matter jurisdiction for the purpose of disposing of a case on a merits-based, personal jurisdiction challenge. Petitioner bases this conclusion on the maxim that a federal court always has jurisdiction to determine its own jurisdiction. Respondents agree that federal courts have jurisdiction to determine jurisdiction. That, however, is not the issue. Rather, the question here is whether federal courts can ignore a lack of subject matter jurisdiction. In particular, when a district court's subject matter jurisdiction in a removed case is called into question, may it nonetheless proceed with discovery, and then enter a dispositive, merits-based judgment based on a state law question of amenability to process without ever considering whether Article III jurisdiction exists? A long line of cases, culminating with the recent opinion in *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), establish that it cannot.

I. THE FIFTH CIRCUIT CORRECTLY APPLIED PRIOR DECISIONS OF THIS COURT

Subject matter jurisdiction lies at the very heart of federal court authority. Recognizing this important principle, the Fifth Circuit's opinion below requires federal

courts sitting in removed cases to resolve issues of subject matter jurisdiction before considering contested issues like personal jurisdiction. In reaching this conclusion, the Fifth Circuit followed the mandate that subject matter jurisdiction is a "fundamentally preliminary" and threshold issue. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979).

A. Subject Matter Jurisdiction is a Threshold Inquiry, Especially in Cases Removed from State Court

As this Court has recognized consistently, "[f]ederal courts are courts of limited jurisdiction" acquiring power to adjudicate claims from both Article III and Congress. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982); *Aldinger v. Howard*, 427 U.S. 1, 15 (1976). Other than the Supreme Court, every federal court "derives its jurisdiction wholly from the authority of Congress," and Congress may "give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Thus, " '[w]ithout jurisdiction the court cannot proceed at all in *any* cause' " and " 'the only function remaining to the court is that of announcing the fact and dismissing the cause.' " *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1012 (1998) (quoting *Ex Parte McCardle*, 74 U.S. 506, 514 (1868) (emphasis added)). This threshold inquiry is all the more important when, as here, the case has been unilaterally removed from the state courts by one of the litigants.

The Court has admonished federal courts to tread cautiously when exercising subject matter jurisdiction in a case removed from state court. "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the

rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the [removal] statute has defined.' " *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). Indeed, to permit a federal court with no subject matter jurisdicion to enter a judgment in a removed case would "work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them." *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18 (1951).

Cognizant of these concerns, Congress strictly limited federal removal jurisdiction and attempted to check the incentive to remove cases without jurisdiction. It required that a case not be removed until it has in fact "become removable." 28 U.S.C. § 1446(b). It mandated remand when "at any time before judgment it appears that the district court lacks jurisdiction." 28 U.S.C. § 1447(c). It authorized the entry of fee awards for improper removal and rejected any right to appeal an order of remand "no matter how plain the legal error." *See Briscoe v. Bell*, 432 U.S. 404, 413 n.13 (1977).

Every federal appellate court has been mindful of the limited nature of removal jurisdiction and the attendant potential for interference with state court proceedings. *See, e.g., Ahern v. Charter Township*, 100 F.3d 451, 454 (6th Cir. 1996) ("Due regard for state governments' rightful independence requires federal courts scrupulously to confine their own jurisdiction to precise statutory limits."); *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985) ("Because lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile, the removal statute should be strictly construed and all doubts should be resolved in favor of remand.") (quoting 14 CHARLES ALLEN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3642 (2d ed. 1985)).

Consistent with the Fifth Circuit, the Eleventh Circuit, for example, recently held that federal district courts sitting in removed cases have a mandatory duty to determine subject matter jurisdiction before considering any other dispositive motion. *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1372 n.4 (11th Cir. 1998). "To do otherwise would allow defendants to evade the statutory requirements of § 1441(b) and allow the federal courts to make significant dispositive rulings in a case over which the federal courts may lack jurisdiction." *Id.* ("Important [suhject matter] jurisdictional questions cannot be ignored merely because they are difficult."). Even opposing counsels' treatise recognizes that "it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if federal courts were to entertain cases not within their jurisdiction." 13 CHARLES ALLEN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3522 (2d ed. 1984).

Petitioner's argument not only ignores these fundamental concerns but also neglects serious comity consequences that Congress intended to address in the removal statutes. As is often the case, the personal jurisdiction question here overlapped with the merits. *See, e.g., Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1285-86 n.2 (9th Cir. 1977). Petitioner urged, for instance that its conduct while visiting Respondents' Texas offices did not amount to actionable fraud under Texas law. The District Court so ruled. Pet. App. B-15. There was, in essence, a merits-based ruling. It also was erroneous. While appeal lies to correct the error, the remand question went unresolved and has been held hostage throughout the appellate process. Had the District Court simply addressed its subject matter jurisdiction at the outset and remanded, no appeal would lie, and the severe delay inherent in the appellate process would have been avoided. *United States v. Rice*, 327 U.S. 742, 751 (1946). By ruling on personal jurisdiction and ignoring subject matter jurisdiction, a district court creates the entirely avoidable

possibility of delay occasioned by subsequent reversal on personal jurisdiction.[2] Likewise, even if a district court could be authorized to ignore the question of subject matter jurisdiction, an appellate court still would be bound to address the threshold issue. Either way, a remand ruling is delayed improperly despite 28 U.S.C. § 1447(c).

B. Petitioner's Proposed Rule would Conflict with *Steel Co.*

Petitioner's argument also conflicts with this Court's recent decision in *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1012-13 (1998). In *Steel Co.*, the Court, reiterating the fundamental nature of subject matter jurisdiction, rejected a Ninth Circuit rule that would have allowed a court to assume jurisdiction over a case for the purpose of disposing of it on a closely-related merits ruling. In doing so, the Court held that to decide issues in a case without first confirming subject matter jurisdiction "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.* at 1012. The court further noted that

> This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." . . . "On every writ of error or appeal, the first and fundamental question is that of jurisdiction." . . . The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception."

Id. (citations omitted).

---

[2] This case is a paradigm of such delay, by which the basic question of subject matter jurisdiction has been submerged for over three years, with no end in sight.

Even Petitioner agrees, as it must, that every federal court is required, as a threshold matter, to determine that it has "jurisdiction." Nevertheless, Petitioner argues that a court may ignore a lack of subject matter jurisdiction in order to first address the issue of personal jurisdiction. Petitioner premises its argument on the illogical conclusion that a defense to service of process that includes the term "jurisdiction" in its common name is no different from any other jurisdictional argument. "Petitioner[] fail[s] to recognize the distinction between the two concepts—speaking instead in general terms of 'jurisdiction.'" *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites des Guinee*, 456 U.S. 694, 701 (1982). The Fifth Circuit correctly rejected this "jurisdiction is jurisdiction is jurisdiction" argument. *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 217 (5th Cir. 1998) (en banc).[3]

Subject matter jurisdiction and personal jurisdiction are separate and distinct concepts. The Court has instructed, for example, that "*neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is*, for both are personal privileges of the defendants, rather than absolute strictures on the court." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979) (emphasis added). "The distinction is that subject-matter jurisdictional requirements prevent our overreaching into the powers that the Constitution and Congress have left to the state courts, while personal jurisdiction requirements prevent both state and federal

[3] The recent adoption of Petitioner's "jurisdiction is jurisdiction" argument represents an abrupt about-face for Professors Wright and Miller. Before appearing here, their statements regarding the threshold nature of subject matter jurisdiction were unequivocal. "[W]hen [a motion to dismiss] is based on more than one ground, the court should consider the Rule 12(b)(1) challenge *first*." 5A CHARLES ALLEN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE 1350 (2d ed. 1990) (emphasis added). "Upon finding that it has no subject matter jurisdiction, the district court should strike the case from its docket." *Id.* at Vol. 13, § 3522 (2d ed. 1984 & Supp. 1998).

courts from upsetting the defendant's settled expectations as to where it can reasonably anticipate being sued." *Marathon Oil Co.*, 145 F.3d at 218 (citing *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702-04).

Subject matter jurisdiction, which flows from Article III of the Constitution, is an absolute boundary on a federal court's power to act. Unlike personal jurisdiction, "no action of the parties can confer subject-matter jurisdiction upon a federal court;" "the consent of the parties is irrelevant;" "principles of estoppel do not apply;" and "a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702 (citations omitted). On the other hand, "personal jurisdiction flows not from Art. III, but from the Due Process Clause" and represents an "individual right" that may be waived. *Id.* at 702, 703.

C. *Caterpillar* does not Hold Contrary to These Principles

Petitioner's attempt to conjure up a conflict between the Fifth Circuit's opinion and this Court's decision in *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), is untenable. In *Caterpillar*, the defendants removed the case at a time when there was a lack of complete diversity. *Id.* at 471. The plaintiff objected to jurisdiction after removal and moved the court to remand the case. The trial court *considered the question of subject matter jurisdiction* and denied the motion, although its disposition was erroneous and would have been subject to reversal on appeal had the error remained. *Id.* The non-diverse defendant was later dropped pursuant to a settlement between the parties, and the court subsequently rendered judgment according to a jury verdict. This Court upheld the judgment, holding that the lack of complete diversity at the time of removal was later cured by the dismissal of the non-diverse defendant. *Id.* at 476-77.

Caterpillar is unlike the present case in two important ways. First, in *Caterpillar* the district court *expressly*

ruled—though incorrectly—on the plaintiff's objection to subject matter jurisdiction. In contrast, the District Court in this case *refused to rule* on Respondents' objection to subject matter jurisdiction, instead assuming that the court hypothetically had the power to retain the case, supervise discovery, and enter an order of dismissal. Second, *Caterpillar* was reviewed after final judgment. It was undisputed at that point that subject matter jurisdiction existed. Thus, the purported conflict between this case and *Caterpillar* is illusory.

II. THERE IS NO CONFLICT WITH THE SECOND CIRCUIT

Petitioner's assertion that *Cantor Fitzgerald* conflicts with the present case is flawed for at least two reasons. First, *Cantor Fitzgerald* directly conflicts with the Second Circuit's earlier opinion in *Rhulen Agency, Inc. v. Alabama Insurance Guaranty Ass'n*, 896 F.2d 674 (2d Cir. 1990). In *Rhulen*, the defendants moved the federal district court to dismiss the case for lack of subject matter jurisdiction and personal jurisdiction. *Id.* at 677. The court granted the motion, basing its decision on a lack of personal jurisdiction. On appeal, the Second Circuit held that the "court below mistakenly passed on the asserted absence of personal jurisdiction." *Id.* at 678. The court explained that where "the defendant moves for dismissal [for lack of subject matter jurisdiction], as well as on other grounds, 'the court should consider the [subject matter jurisdiction] challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and need not be determined.'" *Id.* (citing 5 CHARLES ALLEN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (1st ed. 1969)). *Rhulen* is controlling authority in the Second Circuit.[4] *See, e.g., United States v. Fatico*, 603 F.2d 1053, 1058 (2d Cir. 1979) (holding that one appellate panel cannot overrule another panel); *Ingram v. Kumar*, 585 F.2d 566, 568 (2d Cir. 1978) (same). *Rhulen*, of course, is consistent with the Fifth Circuit's decision here.

[4] At least six recent Second Circuit district court cases decided since *Cantor Fitzgerald* have followed *Rhulen*. *See, e.g., United States v. Carpentieri*, No. 96-Civ.-6460, 1998 WL 749042, at *2 (S.D.N.Y. Oct. 26, 1998); *Seemann v. Maxwell*, 178 F.R.D. 23, 25 n.1 (N.D.N.Y. 1998); *Madanes v. Madanes*, 981 F. Supp. 241, 249 (S.D.N.Y. 1997); *Integrated Utils., Inc. v. United States*, No. 96-Civ.-8983, 1997 WL 529007, at *2 (S.D.N.Y. Aug. 26, 1997); *Sanger v. Reno*, 966 F. Supp. 151, 159 (E.D.N.Y. 1997); *Sanchez-Preston v. Luria*, No. CV-96-2440, 1996 WL 738140, at *2 (E.D.N.Y. Dec. 17, 1996). This also has been the practice in the federal courts of Texas. *E.g., American Nat'l Ins. Co. v. Travelers Cas. and Surety Co.*, 8 F. Supp. 2d 938, 939 (S.D. Tex. 1998) ("[T]he first question for the Court is always jurisdiction. . . . If the lawsuit has come before the court via removal, upon determining that subject matter jurisdiction is lacking, the Court's only recourse is remand.").

Petitioner claims that *Cantor Fitzgerald* distinguished *Rhulen* by "citing it for the proposition that a district court may not first decide a challenge to personal jurisdiction *unless* the personal-jurisdiction question is easier to resolve than the subject-matter jurisdiction question." Pet. at 12. However, *Cantor Fitzgerald*'s string cite reference to *Rhulen* does not render it distinguishable. And nowhere in the *Rhulen* opinion does the Second Circuit even imply—as Petitioner now suggests—that the personal jurisdiction issue was "easier" to resolve than subject matter jurisdiction.[5] Rather, the *Rhulen* opinion rests on one

[5] Regardless, personal jurisdiction here could not "easily" be decided in Petitioner's favor. Respondents' state court petition alleged misrepresentations and fraudulent omissions contained in more than one hundred letters sent by Petitioner or Respondent in Houston, Texas over a multi-year period, as well as three in-person meetings at Respondents' Houston headquarters. The claims involved arise from, or directly relate to, all of these intentional contacts by Petitioner with the forum. Petitioner's actions are alleged to have caused Respondents to sustain hundreds of millions of dollars in damages in Texas. Petitioner's stationing of its own employees in Houston for many years also precluded any "easy" decision in its favor. And even if the personal jurisdiction question had been an

clear and inexorable principle: subject matter jurisdiction must be determined first. Because the Court resolves conflicts between, not within, the Circuits, any conflict between *Rhulen* and *Cantor Fitzgerald* is best left to the Second Circuit.

Second, as the Fifth Circuit observed below, Petitioner's reliance on *Cantor Fitzgerald* is misplaced because "the *Cantor Fitzgerald* court grounded its holding primarily on *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 159-60 (2d Cir. 1990)." *Marathon Oil Co.*, 145 F.3d at 223.[6] *Muszynski* was a "hypothetical jurisdiction" case; its holding was invalidated by this Court's decision in *Steel Co.*, 118 S. Ct. at 1016.

In sum, the Second Circuit has reached conflicting conclusions on this issue, and the only case that Petitioner cites to support its conflict argument relied on precedent that has already been overruled by this Court. This Court should adhere to its usual role of resolving only actual conflicts and erroneous decisions. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 397 (1996). Neither is present here.

CONCLUSION

Marathon filed this state tort action over three years ago, seeking a remedy in state court for wrongful acts occurring in and directed toward Texas. By manipulating

---

easy one, it still would not justify wresting a case from the state court in which it was filed.

[6] The *Cantor Fitzgerald* court also cited *Can v. United States*, 14 F.3d 160, 162 n.1 (2d Cir. 1994), and *Bi v. Union Carbide Chemicals & Plastics Co.*, 984 F.2d 582, 584 n.2 (2d Cir. 1993). But as the Fifth Circuit pointed out, "[n]either of these cases, however, supports *Cantor Fitzgerald's* holding. *Can* discusses *which* subject-matter jurisdiction challenge a district court should address first. *See Can*, 14 F.3d at 162 n.1. *Bi* adopts no rule, but instead addresses subject-matter jurisdiction *before* considering personal jurisdiction. *See Bi*, 984 F.2d at 584 n.2." *Marathon Oil Co.*, 145 F.3d at 223 n.18.

baseless procedural hurdles throughout this case's long and tortured history, Petitioner has avoided fair resolution of this litigation in the appropriate forum. The federal courts do not, and indeed never have had, subject matter jurisdiction over Respondents' state tort claims. Rather than delay this case any further, this Court should deny the Petition and remand this case to the state court in which it properly belongs.

Respectfully submitted,

CLIFTON T. HUTCHINSON *
J. GREGORY TAYLOR
DAVID J. SCHENCK
DEREK S. HOLLINGSWORTH
HUGHES & LUCE, L.L.P.
1717 Main Street
Suite 2800
Dallas, Texas 75201
(214) 939-5500
Attorneys for Respondents
* Counsel of Record

November 9, 1998

APPENDICES

APPENDIX A

[Filed Jun. 10, 1997]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20361

MARATHON OIL COMPANY;
MARATHON INTERNATIONAL OIL COMPANY;
MARATHON PETROLEUM NORGE A/S,
Plaintiffs-Appellants
Cross-Appellees,

versus

RUHRGAS, A.G.,
Defendant-Appellee
Cross-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Before POLITZ, Chief Judge, WIENER and STEWART, Circuit Judges.

POLITZ, Chief Judge:

This international commercial dispute involves allegations of fraud, civil conspiracy, and various business

torts. Concluding that the district court lacked subject matter jurisdiction, we vacate and remand with instructions.

Background

In 1976 Marathon Oil Company (MOC) became involved in North Sea gas exploration activities when its affiliate, Marathon International Oil (MIO), purchased a European concern holding a North Sea production license.[1] The production license, originally held by Marathon Petroleum Norge (Norge), ultimately gave another affiliate, Marathon Petroleum Norway (MPN) rights to 24% of a gas field in the North Sea known as the Heimdal field.[2] Another large interest holder in the Heimdal field was Statoil, Norway's state-owned gas company, which had purchased a 40% interest in 1975.

The present litigation arises from alleged oral and written agreements between the Marathon companies, Ruhrgas, A.G., and other European companies, regarding the development and production of Heimdal field reserves. Ruhrgas is Germany's primary gas company. According to the Marathon plaintiffs, Ruhrgas, Statoil, and a consortium of other European companies secretly conspired to monopolize the western European gas market by funneling a large portion of North Sea gas reserves through Ruhrgas's production facilities in Germany.

The plaintiffs allege that to effectuate this plan Ruhrgas duped them into providing MPN with $300 million to participate in extensive construction and drilling operations with the false promises of premium prices for MPN's European gas sales and guaranteed pipeline transportation tariffs to help offset the substantial construction investment.[3]

1 MIO acquired Pan Ocean and its subsidiary, Pan Ocean Norge, which held the North Sea production license. Pan Ocean was later renamed Marathon Petroleum Norway, and Pan Ocean Norge became Marathon Petroleum Norge.

2 MPN acquired the production license by virtue of a Pass Through Agreement with its subsidiary, Marathon Petroleum Norge, the original license holder.

When it ultimately became apparent that premium prices would not be honored and the scheduled transportation tariffs would not materialize, MOC, MIO, and Norge [4] sued Ruhrgas in Texas state court for fraud, misrepresentation, civil conspiracy, and tortious interference with business relations. Ruhrgas timely removed, invoking jurisdiction under diversity of citizenship, federal question, and 9 U.S.C. § 205. After removal, Ruhrgas moved for a stay pending arbitration in Europe which the district court denied. Ruhrgas then filed a motion to dismiss for lack of personal jurisdiction and a motion to dismiss for *forum non conveniens*. The Marathon plaintiffs moved to remand for lack of subject matter jurisdiction. The district court granted Ruhrgas's motion to dismiss for lack of personal jurisdiction and dismissed all other motions as moot. The court then denied Ruhrgas's motion for reconsideration in which Ruhrgas reurged the court to abate all proceedings pending compelled arbitration in Europe. All parties timely appealed.

Analysis

We address at the threshold the vital question of federal subject matter jurisdiction. As courts of limited jurisdiction, federal courts may adjudicate a case or controversy only if there is both constitutional and statutory

3 This proposal was known as the "Heimdal Gas Agreement," which allegedly guaranted a $5.50 per million BTU price. MPN, as assignee of Norge's Heimdal license, was a party to this agreement.

4 As a signatory to the Heimdal Gas Agreement, MPN's claims were subject to binding arbitration in Europe. Norge, however, was not a signatory and asserts that although it assigned its Heimdal license to MPN, it nonetheless has standing to sue for the alleged devaluation of the license. We address that contention *infra*.

authority for federal jurisdiction.[5] Ruhrgas insists that we must rule on its personal jurisdiction challenge without first determining whether we have jurisdiction *ratione materiae*. We are cognizant that in some instances we have permitted the dismissal of an action for lack of personal jurisdiction without considering the question of subject matter jurisdiction.[6]

We decline, however, to extend those cases into mandatory rules of trial and appellate procedure governing the order in which jurisdictional motions must be determined. No dispositive precedent of our circuit has held that a court *must* ignore a lack of subject matter jurisdiction when it has before it an easier disposition of a motion to dismiss for lack of personal jurisdiction. Such a rule necessarily would be invalid in light of our constitutional and statutory authority and the overwhelming body of precedent commanding all federal courts to scrutinize assiduously subject matter jurisdiction at each stage of litigation, trial and appellate, and to dismiss cases not properly before us.[7]

---

[5] *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545 (Former 5th Cir. 1981); Erwin Chemerinski, *Federal Jurisdiction* 217 (1989); *see also Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (Congress may create lower federal courts and thus has the power to vest them with less than full Article III jurisdiction).

[6] *See, e.g., Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir. 1993); *Association Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559 (5th Cir. 1993); *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964).

[7] *See, e.g., Cutler v. Rae*, 7 U.S. (7 How.) 729 (1849); *Mansfield v. Swan*, 111 U.S. 379 (1884); *Louisville & Nashville R.R. Co. v. Motley*, 211 U.S. 149 (1908); *Mitchell v. Maurer*, 293 U.S. 237 (1934); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Philbrook v. Glodgett*, 421 U.S. 7078 (1975); *Judice v. Vail*, 430 U.S. 327 (1977); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100 (5th Cir. 1981); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295 (5th Cir. 1985); *Mocklin v. Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989); *Trizec Properties, Inc. v. United States Mineral Prods. Co.*, 974 F.2d 602 (5th Cir. 1992); *Moore v. United States Dept. of Agriculture ex rel. Farmers Home Admin.*, 55 F.3d 991 (5th Cir. 1995).

We must be ever mindful that any rule or decision allowing a federal court to act without subject matter jurisdiction conflicts irreconcilably with basic principles of federal court authority.[8] On several occasions we have sounded the caution that "[w]here a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect."[9] If dismissals for lack of personal jurisdiction were judgments on the merits, decisions allowing that determination in the absence of federal subject matter jurisdiction would have no validity.[10] The appropriate course is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss.[11] Such a course respects the

---

[8] *See, e.g., Kokkonen*, 511 U.S. at 377 (holding that the jurisdiction of the federal courts "is not to be expanded by judicial decree") (citing *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951)).

[9] *B, Inc.* 663 F.2d at 548; *see also Stafford v. Mobil Oil Corp.*, 945 F.2d 803 (5th Cir. 1991); *Getty Oil Co. v. Insurance Co. of N. Am.*, 841 F.2d 1254 (5th Cir. 1988); *In re Majestic Energy Corp.*, 835 F.2d 87 (5th Cir. 1988); *In re Carter*, 618 F.2d 1093 (5th Cir. 1980).

[10] *See Caterpillar, Inc. v. Lewis*, 117 S.Ct. 467 (1996) (holding that a district court must have subject matter jurisdiction by the time it renders judgment for the judgment to be valid); *see also Weeks v. Fidelity & Cas. Co.*, 218 F.2d 503, 504 (5th Cir. 1955) ("If the refusal to remand was erroneous, the judgment of dismissal was likewise erroneous.") (citing *Ruff v. Gay*, 67 F.2d 684 (5th Cir. 1933), *aff'd*, 292 U.S. 25 (1934)).

[11] Confronted with virtually identical facts, in *Ziegler v. Champion Mortgage Co.*, 913 F.2d 220 (5th Cir. 1990), we raised the

proper balance of federalism. We must, therefore, reject Ruhrgas's invitation to ignore the formidable subject matter jurisdiction issue presented herein and resolve that fundamental issue.

Given the limited nature of federal jurisdiction, there is a strong presumption against same,[12] and "the burden of establishing the contrary rests upon the party asserting jurisdiction." [13] Ruhrgas, as the removing party, has advanced several theories in support of federal jurisdiction. We address each in turn.

A. Diversity of Citizenship

MOC is an Ohio corporation with its principal place of busines in Houston, Texas. MIO is a Delaware corporation with its principal place of business in Houston, Texas. Norge is an alien corporation headquartered in Norway. The defendant, Ruhrgas, A.G., is an alien corporation headquartered in Germany.

Norge's status as an alien corporation defeats diversity jurisdiction,[14] unless, as Ruhrgas contends, Norge was fraudulently joined for that very purpose. Among other complaints,[15] Norge contends that Ruhrgas's monopoliza-

---

subject matter jurisdiction question *sua sponte* and vacated the judgment of dismissal which was based on a lack of personal jurisdiction.

12 *Cf. Leffal v. Dallas Indep. School Dist.*, 28 F.3d 521, 524 (5th Cir. 1994) ("Removal statutes are to be strictly construed against removal.").

13 *Kokkonen*, 511 U.S. at 377; *see also Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991) ("The burden of proving that complete diversity exists rests upon the party who seeks to invoke the court's diversity jurisdiction.").

14 *See Giannakos*, 762 F.2d at 1298 (holding that "[d]iversity does not exist where aliens are on both sides of the litigation").

15 At the time the parties filed their appellate briefs, Norge did not have the right to market Heimdal gas under the Pass Through

tion of the western European gas market completely prevents both MPN and itself from marketing Heimdal gas reserves to non-consortium buyers and thereby devalues the production license. Ruhrgas responds that Norge cannot complain of any damage to its production license as Norge assigned all of its interests in the Heimdal license to MPN.

The party attempting to prove fraudulent joinder has a heavy burden.[16] To establish that a defendant has been joined fraudulently, "the removing party must show [by clear and convincing evidence] either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the [nondiverse] defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts." [17] In making this determination, a court must resolve "all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party." [18]

A close reading of the record and the extensive briefing on fraudulent joinder leave us unconvinced that Norge has been joined fraudulently to diversity jurisdiction.

Agreement. Briefing indicated that MPN's rights under the Pass Through Agreement would terminate if it failed to perform certain obligations. Norge predicted that such a reversion would occur as a result of Ruhrgas's activities during the summer of 1996. The current status of the Pass Through Agreement therefore is unclear. Terms in the agreement, however, indicate that Norge may have continuing obligations to the nation of Norway under the original production license and that Ruhrgas's interference in MPN's activities may be impacting those obligations. Norge also asserts that Ruhrgas has tortiously interfered with MPN's obligations to Norge under the Pass Through Agreement.

16 *Ford v. Elsbury*, 32 F.3d 931 (5th Cir. 1994).

17 *B, Inc.*, 663 F.2d at 549 (footnote omitted).

18 *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992); *see also Burden v. General Dynamics Corp.*, 60 F.3d 213 (5th Cir. 1995); *B, Inc.*

It is not clear what interest Norge possessed when granted the production license, nor can we determine with certainty from the record and briefings what interest *vel non* Norge retains after the Pass Through Agreement. Although Norge maintains that it holds legal title to all unproduced reserves, it is apparent that several other possibilities exist for classifying Norge's property interest. Given Texas's choice of law rules Norwegian law likely would have to be consulted to answer these difficult questions.[19] At this stage in the proceedings, however, Ruhrgas shoulders the burden of proof, and it simply cannot prove, by clear and convincing evidence, that Norge has absolutely no possibility of recovering damages under any theory of liability. Diversity jurisdiction, therefore, is not present.

B. Federal Question Jurisdiction

Ruhrgas asserts that federal question jurisdiction is present because the "[p]laintiffs' claims raise substantial questions of foreign and international relations and questions of customary international law and act-of-state questions which are incorporated into and form a part of the federal common law." The Marathon plaintiffs note that they have alleged only state law causes of action and contend that the well-pleaded complaint rule bars a finding of federal question jurisdiction.

---

19 *See Cantu v. Bennett*, 39 Tex. 303 (1873) (indicating that the law of the situs would control the characterization of Norge's property interests); *but see Swanson v. Schlumberger Tech. Corp.* (Tex. App.—Texarkana 1995, writ granted) (indicating that Texas law may control this determination under the "most significant relationship" test). Given the fraudulent joinder standards, we must presume that Norwegian law would apply. *Burden.* There is, however, no evidence of Norwegian law in the record. Even if we were to attempt to apply Texas law, classification of these various interests and the concomitant rights of Norge to pursue damage remedies would be unclear. This alone precludes a finding of fraudulent joinder. *See Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746 (5th Cir. 1996).

In *Torres v. Southern Peru Copper Corp.*,[20] we found federal question jurisdiction based on the federal common law of foreign relations. As in *Torres*, the defendant's government, the Republic of Germany, has filed a letter of protest with the State Department and an amicus brief with the court. The similarities between the two cases end there. Our holding in *Torres* is a very specific application of the well-pleaded complaint rule, under which the complaint must state a cause of action necessarily requiring the "resolution of a substantial question of federal law."[21] That test was met in *Torres* because the suit itself struck directly at vital economic interests of the nation, and, indeed, at the very sovereignty of the Republic of Peru.

The same cannot be said herein for the Republic of Germany. Its amicus brief focuses primarily on two areas: the enforceability and breadth of European arbitration clauses, and the impact on international trade from allowing suits against European companies to proceed in United States courts. Such concerns, though not insubstantial, would describe many international commercial disputes between western European corporations and United States corporations and cannot properly form the basis of federal subject matter jurisdiction.

Ruhrgas appears to be an important gas supplier in Germany and western Europe but this action does not strike at the sovereignty of a foreign nation. The plaintiffs' claims do not call into question official German policy decisions and the Republic of Germany was not a participant in the activities giving rise to this suit. This litigation does not seek to impose liability for injuries to foreign citizens occurring solely on foreign soil, as was the situation in *Torres*. Indeed, Ruhrgas allegedly came to the United States and defrauded a United States company on American soil. Merely requiring a German cor-

---

20 113 F.3d 540 (5th Cir. 1997).

21 *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983).

poration to abide by state law when present here does not *necessarily* implicate substantial foreign relations issues between the United States and Germany. Further, we remain unconvinced that this suit may impact severely th vital economic interests of a highly developed and flourishing industrial nation such as Germany. Federal question jurisdiction does not exist.

C. 9 U.S.C. § 205

Finally, Ruhrgas claims that this case is removable under 9 U.S.C. § 205 because the plaintiffs' claims relate to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Notably, MOC, MIO, and Norge were not signatories to any arbitration agreement, nor were they parties to any arbitration proceedings.[22]

Under 9 U.S.C. § 205, federal jurisdiction exists if the plaintiffs' claims relate to an arbitration agreement or award falling under the Convention on the Recognition of Foreign Arbitral Awards. An arbitration agreement or award falling under the Convention is one which arises out of an international commercial legal relationship.[23] No one disputes that the plaintiffs' claims arise from international commercial relationships; the issue is whether any *relevant* arbitration agreement exists between the parties to this litigation, a necessary predicate for federal jurisdiction under 9 U.S.C. § 205.[24] Simply stated, there

[22] MPN, however, has participated successfully in arbitration proceedings in Europe.

[23] *See* 9 U.S.C. §§ 205, 2.

[24] *See Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Corp.*, 767 F.2d 1140 (5th Cir. 1995) (holding that the Convention only applies where (1) there is an agreement in writing to arbitrate the dispute; (2) the agreement provides for arbitration in the territory of a Convention signatory; (3) the agreement to arbitrate arises from a commercial legal relationship; and (4) a Non-American citizen is a party to the agreement).

is no such agreement.[25]

Ruhrgas maintains that the Marathon plaintiffs are attempting to enforce provisions of the Heimdal Gas Agreement, an agreement to which they are not parties. It further characterizes this suit as an inappropriate attempt to circumvent the arbitration agreement under which MPN is bound to arbitrate any disputes concerning the Heimdal Gas Agreement. As such, Ruhrgas contends that the Marathon plaintiffs should be estopped from denying the applicability of the arbitration provisions. We are not persuaded.

MOC and MIO are not seeking redress for wrongs done to MPN. Rather, they allege that Ruhrgas and others jointly participated in a scheme to induce them fraudulently into investing $300 million into MPN. That Ruhrgas may have effectuated this fraud through its contractual relationship with MPN does not lead to the conclusion that MOC and MIO are seeking damages for harm done to MPN. Further, MOC and MIO are not seeking damages for any breach of contract; they could not do so because no contracts exist between them and Ruhrgas.[26] The same is true of Norge's claims. Norge merely claims that Ruhrgas's tortious conduct has affected the value of its production license and impeded its obligations and rights under the Heimdal license and Pass Through Agreement. Norge is not seeking damages on behalf of MPN, nor has it claimed entitlement to any rights under the Heimdal Gas Agreement.

[25] Ruhrgas acknowledges that none of the Marathon plaintiffs have any contractual relationship with Ruhrgas and that none of the plaintiffs ever signed an arbitration agreement.

[26] Contrary to Ruhrgas's contention that the Marathon plaintiffs are seeking to enforce the pricing arrangements in the Heimdal Gas Agreement, plaintiffs do not seek injunctive relief. Moreover, the plaintiffs would not be entitled to recover the lost profits of MPN, though such figures may be relative in proving the extent of the plaintiffs' damages.

Finally, Ruhrgas asserts other theories for its thesis that the arbitration provisions in the Heimdal Gas Agreement should apply to all of MPN's corporate affiliates. None is persuasive.

Conclusion

Concluding that the district court lacked subject matter jurisdiction, we vacate the judgment of the district court and remand with instructions that this action be remanded to the 152nd Judicial District Court of Harris County, Texas.

VACATED and REMANDED.

APPENDIX B

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D.C. 20543

November 10, 1997

No. 97-409

RUHRGAS, A. G.

v.

MARATHON OIL COMPANY, *et al.*

Dear Mr. Hutchinson:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
WILLIAM K. SUTER
Clerk